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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. PRECEDENT

The Company's pervasive theme is that the Board's decision in this case "erase[d] twenty-five years of case law" (br. p. 16), graven in stone, as fixed and immovable as a fundamentalist's reading of scripture, impervious to evolution or fresh insight. As we

have shown in our brief (pp. 28-36), and the Board in its in *Weingarten* (pp. 25-27), this version of the actual state of precedent is overdrawn almost to the point of caricature, and the immobility ascribed to law is alien to its inherent receptivity to reasoned change. We add a few words.

The illusion sought of abrupt departure from ironclad precedent may be dispelled by a clear look at the cluster of three cases which is at the beginning point of the Board's serious consideration of the subject. The core issue in each case was ascertainment of the stage in the disciplinary process when the statute enjoins on the employer a mandatory affirmative obligation to meet with the union. The first is *Texaco, Inc.,* 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969). It is that case which marks the Board's initial determination that an employer has an obligation to bargain collectively with the representative of his employees at a disciplinary interview called by him. The second is *Chevron Oil Co.,* 168 NLRB 574 (1967), decided ten days after *Texaco,* in which the Board affirmed a Trial Examiner's decision that an employer had no obligation to meet with a union representative at "fact-finding meetings" (*id.* at 579). It is that case which marks the Board's initial determination distinguishing a disciplinary interview from an investigatory interview in ascertaining whether an employer is duty-bound to meet with the representative. The third case is *Jacobe-Pearson Ford,* 172 NLRB 594 (1968), decided seven months after *Texaco* and *Chevron,* in which the Board sealed the distinction, holding that an employer "did not breach any statutory obligation in denying union representation" to an employee at a "fact-finding meeting", observing that the " 'potential' for disciplinary action was remote and the purpose of the meeting essentially for the gathering of information", and inviting attention to the distinction between *Texaco* and *Chevron* (*id.* at 595 and n. 5).

Until the instant case, the cases which followed *Texaco-Chevron-Jacobe-Pearson* all applied the distinction drawn in that trilogy between disciplinary and investigatory interviews *for the purpose of ascertaining whether the employer was obliged to meet with the representative.* Until this case there was no occasion to consider any other rationale. For, after *Texaco* and until this case, it is fair to say that no employer sought to *coerce* an employee's unrepresented participation in an investigatory interview. The issue rather was whether the employer was statutorily required to meet with the representative at an investigatory interview, not whether the employer was statutorily free to compel the employee to participate in an investigatory interview without the union representative. Thus, as the Board observed of *Texaco* in this case, "[i]n *Texaco* . . ., when the employee asked to be represented in the interview, the employer advised that it would not insist on the interview unless the employee was willing to enter the interview unaccompanied by his representative" (P. 6a). And in *Chevron,* while the employee was told that he would not have the assistance of a union representative at a "fact-finding session", he was also "advised that he may stand mute . . ." (168 NLRB at 577). But in this case freedom to refrain from unrepresented participation at an investigatory interview was not accorded the employee, but she was instead subjected to naked coercion to compel her participation without the presence of her union representative.

Nothing in the cases formulating and applying the distinction between disciplinary and investigatory in-

terviews for the purpose of determining whether the employer has an affirmative duty to meet with the representative furnishes any precedent for allowing an employer to coerce an employee's unrepresented participation in an investigatory interview. We may test this proposition by asking the simple question which this case presents. Is an employer at liberty to discharge or suspend an employee and her fellow-employees who are her union representatives where (1) the employer discharges the employee because she declines to submit to questioning by her employer which she reasonably believes may lead to disciplinary action against her unless she is accompanied by and has the assistance of her union representative at the interview, and (2) the employer suspends one union representative, and suspends and later discharges another union representative, because they seek to furnish the representation asked of them by their fellow-employee? No precedent supports a "yes" answer to that question. A competent lawyer perceptively reading the "case law" could not prudently counsel an employer that he would run no significant risk by firing the employee and her fellow-employees. The issue, if it cannot be said to be wholly free of adverse precedent, can surely be said not to be foreclosed by precedent.[1]

[1] As we have shown in our brief (p. 28), the three cases preceding *Texaco* are simply unpersuasive. Nevertheless, driving the concept of precedent into the ground, an *amicus* brief goes so far as to urge Congressional adoption of the "rule" it espouses, citing for this purpose absence of "evidence of Congressional displeasure" with the decision of the Court of Appeals for the Seventh Circuit in *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607, 611-614, decided on January 2, 1947, preceding the 1947 and 1959 amendments of the National Labor Relations Act, and setting aside the Board's decision in 63 NLRB 1012, 1033-34 (1945) (CC br. p. 10). There is no evidence that any member of Congress even knew of this obscure decision. If knowledge is assumed, there is no evidence of approval of it. For aught that appears, the reversed Board decision was preferred, with the matter of resolving the difference left to additional litigation without the need for legislative intercession at this nascent stage. This Court has declined on a much more persuasive showing of agency practice "to conclude as a general proposition that whenever Congress reenacted without change provisions of the National Labor Relations Act it thereby froze administrative decisions rendered under those provisions." *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 351 (1953). A single court reversal of an agency decision surely does not freeze the issue in the judicial mould via assumed approval from Congressional inaction. "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946).

For the purpose of fortifying the illusion of monolithic precedent, the same *amicus* brief would have it that the "Board's summary affirmance of a law judge's decision must necessarily constitute complete agreement with that decision and *its rationale*" (CC br. p. 7, emphasis in original). This is nonsense. It would be artificial in the extreme to suppose that summary affirmance constitutes endorsement of all the rhetoric, turn-of-phrase, and nuance of the law judge's opinion. It is even more pertinent of an agency's adoption of a law judge's decision than of the agency's own opinion to remember that "[h]owever general or loose the language of opinions, the specific situations have controlled decision." *Hughes* v. *Superior Court*, 339 U.S. 460, 465 (1950). As this Court has said of its own summary affirmances, while "obviously . . . of precedential value", they "[e]qually obviously . . . are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

II. RATIONALE

The Company would fault the Board on the ground that it has failed to "disclose the findings and analysis which support its decisional conclusions so as to give clear indication that it has exercised, and not exceeded, the discretion with which Congress has empowered it" (br. p. 19). The Board has amply articulated the rationale on which its decision rests (our br. pp. 8-12). It has therefore fully discharged its responsibility that

"the statute speak through the Board where the statute does not speak for itself." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 196 (1941). See also, *Republic Aviation Corp.*, v. *N.L.R.B.*, 324 U.S. 793, 801-803 (1945).

Accordingly, the issue is, not whether the Board has sufficiently explicated the basis for its determination, but whether that determination has reasonable warrant. We turn to this question.

A. Concerted Activity for Mutual Aid or Protection

The Board confines the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee requests representation (our br. p. 10). In stressing the to-be-interviewed employees' "personal request for representation" (Co. br. p. 12), the Company may be suggesting that no concerted activity for mutual aid or protection within the purview of section 7 exists if an individual request for representation is the factor which brings the protection into play. An *amicus* brief makes this argument more directly (CC br. pp. 16-18). We turn to it.

The crux of the idea of concerted activity for mutual aid or protection was expressed by this Court in *Houston Insulation Contractors Assn.* v. *N.L.R.B.*, 386 U.S. 664, 668-669 (1967), quoting with approval from Judge Learned Hand's opinion in *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (C.A. 2, 1942):

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

Accordingly, it makes no difference that the to-be-interviewed employee initiates the request for union representation and may be the "only one . . . who has any immediate stake in the outcome." For what the individual employee seeks is the assistance of another. When the two make "common cause" in confronting the employer—the one being helped by the other in coping with his predicament—they are engaged in concerted activity in the most literal sense. They are acting in common. And the concert is all the plainer when it is *union* representation which is sought. For the employees as an entirety have pooled their interests for the precise purpose of enjoying the enhanced protection of institutional strength that comes from union representation. The very fact that it is a union representative's help that is being sought is an exact manifestation of activity in concert, for the employees have joined in a union to get from each other just this sort of united effort when one of them is in trouble. As shop chairlady Delila Mulford stated when the Company refused to have her represent Catherine King, "Catherine paid her dues and she was entitled to [have me] be there" (A. 47). After Mulford was suspended, assistant shop chairlady Martha Cochran took over the attempted representation of King, and in answer to the Company's question why she was there

"with King," she replied, "I was a union steward and that was my duty" (A. 27).

Concerted activity is thus clear, and so is mutual aid or protection. For the one who comes to the aid of the other in his individual predicament "assures himself, in case his turn eve comes, of the support of the one" then being helped. This mutual aid or protection is the essence of alliance of workers in a union. They seek and get each other's aid, and they institutionalize their reciprocal support by selecting one among their number to represent them. The "solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts." That is what union representation is all about.

It of course makes no difference that the Board confines the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee requests representation. The Board has simply given the employee an option, to go it alone if that is what he prefers, or to invoke the aid of union representation if that is what suits him. When the employee chooses union representation, refusing to participate in an interview unless accompanied by his representative, he is exercising his guaranteed right to engage in concerted activity for mutual aid or protection, as nobody should doubt. That he is free to forego that protection is no reason to say that he does not have it when he does desire to avail himself of it.

B. Reasonable Grounds To Believe

The Board limits statutory protection to the employee who "has reasonable grounds to believe that the matters to be discussed [at the interview] may result in

his being the subject of disciplinary action" (P. 9a). The Company frenetically objects that this standard requires inquiry into "the subjective state of mind" of the employee and is unworkable (Co. br. pp. 21-24).

To require that a belief be based on "reasonable grounds" is the antithesis of subjectivity. Thus, in explaining the basis for the qualified immunity of executive officers for acts performed in the course of official conduct, this Court stated that existence of immunity requires "*reasonable grounds for the belief* formed at the time and in the light of all the circumstances, coupled with good faith belief . . . ." *Scheuer* v. *Rhodes,* 416 U.S. 233, 247-248 (1974) (emphasis supplied). Similarly, workers who engage in what would otherwise be a breach-of-contract strike are free of fault when "abnormally dangerous conditions for work" are the reason for their act, but only if their belief is supported by "'ascertainable, objective evidence . . . .'" *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 386, 387 (1974). A "reasonable grounds for belief" standard, routinely applied in other fields designedly to prevent subjectivity from controlling, does not suddenly become unspeakably objectionable when it is an employee's apprehension of disciplinary action which is under inquiry

As the Board has stated, "'reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case" (P. 6a, n. 3). This is not a risk-free criterion for either the employee or the employer. But there are no risk-free criteria. The best that is manageable is a reasoned judgment based on objective perception of external circumstances. That is generally good enough. It is surely no more difficult to determine an employee's "reason-

able grounds" for apprehension than it is to determine whether an employer's interview is investigatory or disciplinary. The latter dichotomy is hardly self-illuminating. Application of the "reasonable grounds" for apprehension standard can therefore cause an employer no more difficulty than application of the investigatory/disciplinary interview standard.

But on this issue a page of experience is worth a volume of rhetoric. For the fact is that as a matter of everyday actual industrial practice employers routinely apply just the procedure that the Company complains is unworkable (our br. pp. 23-25). What works cannot be contested as unworkable.[2]

[2] An *amicus* brief points to the Board's decision in *Mobil Oil Corp.*, 196 NLRB 1052 (1972), as an example of unworkability (CC br. pp. 15-16). It is, however, only an example of the misreading of a case. The case before the Board involved four employees, Smith, Burnett, Matthews and Hill. The Board found no violation as to Matthews and Hill because "each failed to request union representation prior to or during their respective interviews . . ." (*id.* at n. 2). A violation was found as to Smith and Burnett because each "had reasonable grounds to fear they were suspected of theft", and therefore their requests for union representation at the interview should have been honored if their compulsory participation in the interview was to be exacted (*id.* at 1052). Contrary to the statement in the *amicus* brief, the Board did not find that the discharges of these two employees were unlawful; their discharges were based on alleged theft by them, not for exercise by them of any statutorily protected right, and were thus subject solely to a grievance under the collective bargaining agreement to determine their validity. The Board consequently entered only an *in futuro* order requiring the employer to "desist from requiring that any employee take part in an interview or meeting without union representation, if such representation has been requested by the employee and if the employee has reasonable grounds to believe that the matters to be discussed may result in his being subject to disciplinary action" (*ibid.*). None of this is evidence of unworkability.

III. COLLECTIVE BARGAINING

The Company claims that "Congress intended representation disputes" over attendance at investigatory interviews "to be resolved in the dispute settling procedures worked out by the union and employer parties to bargaining contracts" (br. pp. 29-30). The argument takes a number of different turns not easily followed. We attempt to identify what seems to be the gist of each facet and to meet it.

1. The Company may be saying that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the statute but can be secured only by contract. We have already addressed that argument and do not repeat our comments (our br. pp. 26-27). The protection is vouchsafed by statute, and the employer has no "option of bargaining concerning a matter guaranteed the employee as of right. . . ."[3] If the right is obtainable only by contract, the supreme irony that would result is that those employees will have protection who are represented by strong unions and need it least, and those employees will be denied protection who are represented by weak unions and need it most. The Act insulates the protection conferred by union representation from the economic arena and safeguards it statutorily precisely because it does not countenance a contest over the underlying need to give workers the opportunity to

[3] *McQuay-Norris Mfg. Co.* v. *N.L.R.B.*, 116 F.2d 748, 751 (C.A. 7, 1940).

deal on equality with their employer (our br. pp. 20-23, 35-36).[4]

2. The Company appears to claim that the validity of coercing an employee's participation without union representation in an interview in which the risk of discipline reasonably inheres is an issue that should have been decided by an arbitrator in arbitration under the collective bargaining agreement and not by the Board in an unfair labor practice proceeding under the National Labor Relations Act. The argument is devoid of merit. First, "the arbitrator has authority to resolve only questions of contractual rights",[5] so that it is bootless to refer to him the separate question of the independent existence of the statutory right over which he has no power. Determination of the statutory right is at the heart of this case and the Board alone can initially decide it. And the Board has specifically declined to refer this question of statutory right to arbitration. *J. Weingarten, Inc.*, 202 NLRB No. 69 (1973), in Board's petition for a writ of certiorari in *N.L.R.B.* v. *J. Weingarten, Inc.*, No. 73-1363, p. 27A, n. 9. Second, the Company did not urge referral to arbitration at any time before either the Trial Examiner or the Board. Even where referral is otherwise thought appropriate (see *Collyer Insulated*

[4] An *amicus* brief argues not only that the protection is obtainable solely by contract but that negotiation to secure that protection "is not a mandatory subject of bargaining . . ." (CC br. p. 22). This *amicus* stands alone in espousing such primitivism, all others freely granting that at the least the employees have a statutory right to bargain and strike for contractual protection.

[5] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974); see also, *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351 (1971); *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 268-270 (1958).

Wire, 192 NLRB 837 (1971)), the Board will not stay its hand where the employer "neither pleaded nor attempted to litigate affirmatively the *Collyer* deferral-to-arbitration defense." *Nedco Construction Co.*, 206 NLRB No. 17, 84 LRRM 1205 (1973); *MacDonald Engineering Co.*, 202 NLRB No. 113, 82 LRRM 1646, 1647 (1973); *Asko Inc.*, 202 NLRB No. 30, 82 LRRM 1498, 1500 (1973); *Erie Strayer, Co.*, 213 NLRB No. 45, 87 LRRM 1162, n. 1 (1974). Third, since the issue of referral to arbitration was not raised before the Board, judicial review of the matter is in any event barred. *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S 318, 322 (1961)[6]

[6] The Company's plea that the issue should have been determined in arbitration is disingenuous for an additional reason which does not appear of record. The record shows that the discharges of employees King, Mulford, and Cochran were grieved and that arbitration was invoked by the Union (A. 109-110, 111-112). The following facts not of record show that the Company aborted the arbitration proceeding. On November 14, 1969, in accordance with the terms of the agreement (A. 195-196), the Union wrote to the American Arbitration Association requesting "the selection of an Arbitrator under the Rules of the Association", identifying the "issues to be arbitrated . . . as follows:"

1. Lockout on or about November 1, 1969.
2. Discharge of Catherine E. King.
3. Discharge of Delilah Mulford.
4. Discharge of Martha Cochran.
5. Grievance of Delilah Mulford for suspension on October 13, 14 and 15, 1969.
6. Grievance of Martha Cochran suspending her on October 13, 14 and 15, 1969.
7. Failure to pay Health and Welfare and Pension Funds retirement and severance payments between April 15 and May 31.
8. Failure to abide by Article XIX—Access to Shop.

The Company did not respond to the arbitration request or any of the correspondence addressed to it by the American Arbitration

3. The Company may be arguing that the Union in its collective bargaining agreement with the Company waived the protection the statute confers. Again the Company did not raise the issue before the Board and is therefore precluded from asserting it for the first time on judicial review. But assuming the merits are reachable, the argument is untenable.

The Company assumes that waiver is available, but only one member of the Board has addressed that issue and concluded in favor of waiver (*Western Electric Co.*, 198 NLRB No. 82, 80 LRRM 1705, 1707 (1972)), so that this fundamental threshold question is still undetermined by the Board, and the objections to waiver are very formidable. See, *N.L.R.B.* v. *The Magnavox Co.*, 415 U.S. 322 (1974). Putting this hurdle to the side, there is no possible basis for as-

Association. Accordingly, the Association appointed G. Allen Dash, Jr., to serve as Arbitrator, and scheduled a hearing for February 26, 1970. Several days before the hearing, the Company informed the Union that it had retained an attorney to represent it, that the attorney had been hospitalized by a heart attack, and that a postponement of the hearing would therefore be required. Upon the Union's verification of the information, it agreed to a continuance, and the hearing was reset for March 23, 1970. On March 10, 1970, the office of the Company's attorney informed the Union's counsel that the attorney would be unavailable indefinitely. The Association was informed of this development. The Union sought to persuade the Company to set a new hearing date and to retain new counsel. The Company refused. Meanwhile, to prevent the running of the six-month period of limitations prescribed by section 10(b) of the National Labor Relations Act, the Union on March 19, 1971 filed the unfair labor practice charge which underlies this proceeding, and upon advice from the Regional Director that the charge had merit and would be prosecuted, the Union discontinued its efforts to pursue its arbitration demand. The Board will not defer to an arbitral remedy where a party, although professing to desire arbitration of the dispute, engages in "foot dragging" delaying reasonably prompt arbitration. *Medical Manors*, 206 NLRB No. 124, 84 LRRM 1421, 1422 (1973).

serting that the statutory right has been surrendered. It is settled law that contractual relinquishment of a statutory right "must be clear and unmistakable and will not be extended by implication . . . ."[7] Nothing in the agreement evinces any showing, much less a "clear and unmistakable" showing, of waiver. On the contrary, the very breadth of its adjustment procedure manifests an intention to preserve every right of union representation at every level of the employment relationship (P. 37a-38a; A. 195-196):

> 1. Any and all disputes, complaints, controversies, claims, or grievances whatever between the Union or any employees and the Employer which directly or indirectly . . . relate to . . . the acts, conduct, or relations between the parties shall be adjusted as follows: (a) The Shop Chairlady, . . . together with a representative of the Union, shall attempt to settle the matter with a representative of the Employer . . . . 2. It is intended that this provision shall be interpreted as broadly and inclusively as possible.

Based on this provision the Trial Examiner concluded that the interview which the Company requested that employee Catherine King attend alone, "regardless of whether actual disciplinary measures are imposed thereat, is so intimately connected with working conditions that, *under the contract*, King was entitled to be represented by a representative of the Union during the course thereof" (P. 46a, emphasis supplied). It is thus plain that, whether or not the protection of

[7] *Morton Salt Co.* v. *N.L.R.B.*, 472 F.2d 416, 420 (C.A. 9, 1972), judgment vacated on another issue, *sub nom. International Association of Machinists and Aerospace Workers* v. *O'Reilly*, 414 U.S. 807 (1973). See also, *Kellogg Co.* v. *N.L.R.B.*, 457 F.2d 519, 525 (C.A. 6, 1972), cert. denied, 409 U.S. 850 (1972).

union representation had been conferred by contract, it surely was not relinquished by contract.

4. The Company contends that, when Congress in section 9(a) of the National Labor Relations Act conferred exclusive representative status on a union "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment," it excepted from this exclusivity the right of an employee or group of employees "to present grievances to their employer" within specified limits, and therefore by negative implication Congress "extended no specific statutory right to either employee or union that a representative be permitted to intervene in . . . [employer-employee] meetings prior to a grievance being filed" (Co. br. p. 29).[8]

Section 9(a) and its provisos are beside the point in this case. The right of an employee to be free of compulsory attendance without union representation at an interview with his employer which he reasonably believes may result in his subjection to discipline rests on section 7 of the Act. This is not a right in the employee to compel the employer to negotiate with either the

[8] Section 9(a) of the National Labor Relations Act provides that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

employee or his union. The employer need not meet with either. But it is a right in the employee not to be coerced into meeting alone with the employer. The employer cannot be compelled to meet with the union representative but neither can he compel the employee to meet without the union representative. The source of this right is section 7; it does not depend on section 9(a) or its provisos; it is not diluted by section 9(a) or its provisos.

This is demonstrable analytically. For the right exists in the absence of any union in the picture, much less a union entitled to exclusive representative status. Thus, if an employee is summoned to a meeting with his employer in which the risk of discipline reasonably inheres, he may insist without risk of reprisal upon being accompanied by a fellow-employee to assist him, for the two would be engaged in concerted activity for mutual aid or protection within the safeguard of section 7 (*supra*, pp. 6-8). ". . . [E]mployees . . . have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining contemplated." *N.L.R.B.* v. *Phoenix Mutual Life Ins. Co.*, 167 F.2d 983, 988 (C.A. 7, 1948), cert. denied, 335 U.S. 845 (1948).

But even were it true that the right is dependent upon the existence of a statutory obligation in the employer to meet with the union at an investigatory interview, we have already shown that such an obligation does exist (our br. pp. 32-33). Section 9(a), in conjunction with sections 8(a)(5) and 8(d), is the source of that right, and to whatever extent the provisos subtract from the union's exclusivity when an employee chooses to go it alone, the provisos surely do not detract from the employees' right to union representation when he prefers his union's help.

IV. PROCEDURAL DUE PROCESS

The Company contends that the Board formulated the employee's "reasonable grounds to believe" standard only after the Trial Examiner's decision, and therefore it had no notice of or an opportunity to meet the issue of the reasonableness of the employee's basis for apprehension at the evidentiary hearing (Co. br. pp. 24-29). Notice and an opportunity to be heard are of course basic. But the Company's claim that these protections were denied it is totally abstract, for it particularizes no evidence that it could or would adduce at a hearing on this issue that it did not in fact present. "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests." L. Hand, J., in *Fay* v. *Douds*, 172 F.2d 720, 725 (C.A. 2, 1949). "Nebulous and declamatory assertions, wholly unspecified," do not show denial of the procedural means to defend substantive interests. *Ibid.*

Thus, at no stage of the proceeding—either before the Board, the Court of Appeals, or to this day before this Court—has the Company concretely identified a single item of evidence that is omitted from the record that it would have adduced had it been seasonably forewarned of its materiality. *First,* regardless of any theoretical deficiency in the identification of any issue, at the hearing itself the parties fully and meticulously adduced all the evidence relating to the entirety of the underlying situation. There was nothing left out pro or con pertaining to any event. But if anything was missed, and its relevance was not discernible until the Board articulated its "reasonable grounds to believe" standard, the Company under the Board's rules still had a full opportunity to adduce the evidence by moving the Board to reopen the record to receive it.[9] No such motion was made; the Board was never apprised in any way of what it should have considered that it did not. The Board cannot be convicted of denial of due process when it was never informed that any further process was sought. See, *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 804 (1945).

Second, having failed to object to the supposed deficiency before the Board, although full opportunity to do so existed, judicial review of the issue is precluded. *Glaziers' Local No. 558* v. *N.L.R.B.*, 408 F.2d 197, 202-203 (C.A.D.C., 1969). But if it were not, the Company was as silent before the Court of Appeals as it had been before the Board when it came to concrete particularization of any omitted evidence. It identified nothing, contenting itself instead with glittering generalities about the requirements of procedural due process, but not explicating in what specific way it had been denied. It did not apply to the Court of Appeals for leave to adduce additional evidence before the Board, in which

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[9] Section 102.48(d)(1) of the Board's Rules and Regulations (29 C.F.R. 102.48(d)(1)) provides that:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

application it would have had to "show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . ." (NLRA, § 10(e));[10] nor did it make any showing on brief. It left the Court of Appeals as uninformed as the Board.

Third, the Company's abstraction continues before this Court. It is still silent as to any specifics. It has "not yet suggested what . . . [it] could have added to the hearing by way of facts . . . ." *Humphrey* v. *Moore,* 375 U.S. 335, 350-351 (1964). The Company presents a frame without a picture. The emptiness of the Company's argument is patent. Were it to prevail, the relief it would obtain would be a remand to the Board to adduce the additional evidence it claims should be considered. What evidence? What does the Company propose to adduce at a reopened hearing? A remand to receive no evidence is a futile exercise. "If there is nothing to hear, then a hearing is a senseless and useless formality." *N.L.R.B.* v. *Air Control Products of St. Petersburg,* 335 F.2d 245, 249 (C.A. 5, 1964).[11]

V. RETROACTIVE APPLICATION

An *amicus* brief contends that in this case "the Board has engaged in the meretricious practice of retroactively imposing its new rule so that an employer's conduct, lawful before the issuance of that decision pursuant to rules then in effect, was rendered illegal because of that decision" (CC br. p. 24). The Company, however, has made no such contention, either before this Court, the Court of Appeals, or the Board. Judicial review of the issue would be barred were the Company to tender it, and it is surely not open to an *amicus* to inject an issue which a party itself could not. It is not the office of an *amicus* to raise issues that the parties did not; questions presented by it but not by the parties will not be considered. *Knetsch* v. *United States,* 364 U.S. 361, 370 (1960).

[10] *Consolidated Edison Co.* v. *N.L.R.B.,* 305 U.S. 197, 226 (1938); *Southport Petroleum Corp.* v. *N.L.R.B.,* 315 U.S. 100, 104-105 (1942); *Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 793, 804 (1945).

[11] See also, *N.L.R.B.* v. *Griffith Oldsmobile,* 455 F.2d 867, 868-869 (C.A. 8, 1972).

But if the issue is to be examined, it should be observed that it is confined to that part of the order which requires that the employees be made whole for the injury caused by the wrong they suffered. The Company's self-interest is not objectionably disadvantaged by the requirement that it observe the *in futuro* provisions of the order or that it reinstates the employees illegally ousted from their jobs. The specific question then is whether the employees should be denied back pay relief.

Whether or not retrospective relief is appropriate to vindicate a newly-enunciated principle requires a balance of the interests of the wronged and the wrongdoer in the light of the basic determinant of furthering the statutory purpose (*S.E.C.* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947)):

> That such action might have a retroactive effect . . . [is] not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory

design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

In this case there would be no foundation for a claim that basic fairness is affronted by requiring the Company to make the employees whole. *First,* the standard adopted in this case is new only in the sense that before now no case which reached the Board squarely presented the question whether an employer is empowered to discharge an employee, and suspend or discharge her fellow-employees, for no cause other than insistence on union representation at an investigatory interview in which the risk of discipline reasonably inhered. As we have shown (*supra,* pp. 2-4), a perceptive reading of "case law" would not warrant a prudent judgment that the Company was pursuing a risk-free course. The Company therefore could not claim unfair surprise when it tripped along the chancy route it was running. *Second,* given the most wooden reading of Board precedent, it would be obvious that the Company was courting serious trouble on settled grounds. At the very least, the Company would be subject to the plain claim that it was conducting a disciplinary rather than an investigatory interview; that it was therefore duty-bound to grant union representation at the interview; and that suspending and discharging employees for asserting their right to union representation at a disciplinary interview is a garden-variety unfair labor practice. Indeed, in this case, the Trial Examiner "expressly" found that "such meeting did not seek information and was not investigatory in nature" (P. 38a), but that its purpose was disciplinary (*ibid.,* P. 45a), and on that basis he held that the discharges and

suspensions were unlawful. *Third,* quite aside from statutory protection, the collective bargaining agreement provided that "No worker shall be discharged or otherwise disciplined without good and sufficient cause" (A. 189); that "if the discharge or disciplinary act is found to be unjustified, the worker shall be reinstated and shall be compensated for the loss of his earnings during the period of such discharge or disciplinary act" (*ibid.*); and that a claim of violation of the contractual right was subject to determination through the grievance and arbitration procedure established by the agreement (A. 195-196). In this case the Union grieved the suspensions and discharges and invoked arbitration to resolve the claim (*supra,* p. 13, n. 6), a riposte so obvious that no employer could fail to realize its inevitability. In short, the Company was playing with too many fires to be able to complain that it did not foresee the particular one which burned it.

The Company's interest is therefore very shadowy. It brings a slight counter to weigh in the remedial balance. The employees' interest, on the other hand, is very heavy. They are the victims of the wrong. The only way to restore the *status quo ante* is to compensate them for their loss of earnings. Anything less leaves them without effective redress. The Board's remedies are notoriously weak at best.[12] To deny back pay would

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[12] Fanning, *New and Novel Remedies for Unfair Labor Practices,* 69 LRR 282 (1968); Brown, *Exploring the World of Remedies,* Labor Relations Yearbook-1967, 251; Fanning, *The Taft-Hartley Act-Twenty Years After,* Labor Relations Yearbook-1967, 209, 220; McCulloch, *An Evaluation of the Remedies Available to the National Labor Relations Board-Is There Need for Legislative or Administrative Change?,* 56 LRRM 125 (1964); McCulloch, *The Development of Administrative Remedies,* Address before the Midwest Seminar on NLRB Policy Changes, University of Chicago,

be to withhold the only redress which has any bite. Compensatory and deterrent objects of remedial relief would both be defeated.

The balance of interests thus clearly favors the employees. "... [T]he importance of protecting the statutory rights of ... [the] employees outweighs the fact that the company may have relied on a prior Board rule or policy. ... 'Unless the disadvantaged ... [employees] are compensated, they will have been penalized for exercising statutorily protected rights and the effect of discouraging future such exercises will not be completely dissipated. In these circumstances, it was not arbitrary or capricious for the Board to conclude that complete vindication of employee rights should take precedence over the employer's reliance on prior Board law.' " *Laidlaw Corp.* v. *N.L.R.B.*, 414 F.2d 99, 107 (C.A. 7, 1969).

In sum, given that the " 'relation of remedy to policy is peculiarly a matter for administrative competence' ", and that an order of the Board "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act' ", the back pay remedy in this case easily passes muster. *Fibreboard Paper Products Corp.* v. *N.L.R.B.* 379 U.S. 203, 216 (1964). And it surely does not lie in the mouth of

February 2, 1963; Ross, The Labor Law In Action-An Analysis of the Administrative Process under the Taft-Hartley Act (1966); Administration of the Labor-Management Relations Act by the NLRB, Report of the Subcommittee on the National Labor Relations Board, House Committee on Education and Labor, 2 (1961).

an *amicus* to say otherwise when the Company itself does not object.

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